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Essay

Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York

David L. Chambers*

Here are two stories. They are of the quite different ways that domestic partnerships of lesbian and gay couples have come to be recognized, for some purposes, in San Francisco and New York City. I tell the stories for their own sake, but with a particular focus on the role that AIDS played in the political process in each city.

I do not believe that AIDS is the most important factor in understanding what went on in either city. In fact, of course, the movement to give legal force to lesbian and gay male relationships long precedes the epidemic. It simply happens that I undertook this study of the domestic partnership movement as a member of a group conducting an inquiry into the various social impacts of AIDS in the United States.¹ I now believe that AIDS did play a role in the substantial efforts over the last decade to gain legal recognition of lesbian and gay relationships--that it is not simply a coincidence that the intensification of efforts to protect domestic partnerships occurred simultaneously with the epidemic. At least in New York and San Francisco, two of the American cities hardest hit by the epidemic, AIDS seems to have affected both the timing of the legal activity and the language and tactics of both proponents and opponents. Whatever the causal relationship between the two, the domestic partnership movement and AIDS reveal the interaction of love and death, passion and suffering, dependence and individual loss; at its most mundane, it reveals the inter-

* Wade H. McCree, Jr., Collegiate Professor of Law, University of Michigan. This article began as part of a study that I undertook as a member of the National Academy of Science's National Research Council Panel on Monitoring the Social Impact of AIDS. The full volume of the panel will appear in 1993. In its preparation, I was aided by Daniel Conviser, J.D., University of Michigan 1990, who studied the recent history of rent regulated housing in New York. I am also grateful to the many persons I interviewed in New York and San Francisco who participated on one side or the other in the debates and litigation in the two cities.

1. See *supra*, note *.

action of love and health insurance, commitment and rent-controlled housing.

The debate over the appropriate way for states to recognize lesbian and gay relationships has been well traversed in the legal literature, most recently and provocatively in the first issue of this new journal.² As there discussed, the initial strategy to induce courts to recognize same-sex marriage failed in the courts and was later disavowed by many feminists and others within the lesbian and gay legal movement. In the recent past, though some couples (nearly all male) have continued to bring judicial challenges to marriage laws, efforts have shifted to two other approaches. The first has been to persuade cities to adopt ordinances that permit domestic partners to register their relationship. Most of these ordinances create no benefits or obligations for those who register. Their formal effect is wholly symbolic—a recognition of a form of committed relationship other than marriage—but they do set the stage for public and private employers who might later choose to provide benefits to employees who have registered with a partner. It is this approach that was taken in San Francisco and the efforts over the years to secure the passage of a domestic partnership ordinance there are described in the first part of the essay that follows.

The other approach has been to focus on particular needs of lesbian and gay couples and to persuade courts or legislatures to treat same-sex couples like married couples. Thus some cities have begun to make health insurance benefits available to the domestic partners of city employees. The second story we tell here is of the efforts leading to the decision by the New York Court of Appeals to provide for the gay domestic partner of a tenant in a rent-controlled apartment the same opportunity to remain in the apartment after the death of the tenant that other family members of the tenant would have had.

I. SAN FRANCISCO

In November 1990, voters in San Francisco approved an ordinance to permit unmarried persons to register with the city as “domestic partners.” Adopted by a wide margin, the gay community of San Francisco regarded the vote as a triumphant affirmation for all gay persons. The road to its passage, however, begun eight years earlier, had been strewn with potholes and detours.

The first effort in San Francisco for a domestic partnership ordinance occurred in 1982, after some cases of AIDS had been reported, but before

2. See Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 31 (1991); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 63 (1991); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 9 (1991).

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AIDS had deeply imprinted itself on the minds of most San Franciscans. On that occasion, Harry Britt, at the time the only gay member of the County's Board of Supervisors, proposed legislation to permit unmarried couples to register with the city if they affirmed that they shared "the common necessities of life" and that they were each other's "principal domestic partner."³ The bill prohibited the city from treating domestic partners and married persons differently.

The Board passed the bill, but the city's major newspapers and the Catholic Church opposed it and Mayor Diane Feinstein, who had supported many initiatives favored by gay men and lesbians, vetoed it. She objected to what she considered the broad potential reach of the bill and expressed fears about the impact of the bill on the institution of marriage. When Supervisor Britt introduced essentially the same bill the following year, 1983, Mayor Feinstein announced that she would veto it again, if it were passed again, and the bill was withdrawn. AIDS played little role in the debate, though by 1983, many cases of AIDS had been identified and a number of those who opposed the bill argued that it would lead to medical insurance coverage for the partners of gay city employees and thus, eventually, to increased medical care costs for the city.

Six years passed before domestic partnership legislation was introduced again. In 1989, a two-year effort began during which an ordinance was initially adopted, then rejected by the voters, then proposed again, and finally adopted. Supervisor Britt continued to lead the efforts, in a social and political context that had changed in the intervening years. A few smaller cities in California, including Berkeley, had by then adopted ordinances to provide health insurance coverage for domestic partners of city employees.⁴ Harry Britt was now President of the Board of Supervisors and the city's new mayor, Art Agnos, had run on a platform supporting domestic partnership legislation. HIV had by then taken the lives of nearly 4000 gay men in San Francisco alone and had infected tens of thousands of others. By 1989, many believe, AIDS had substantially reshaped the meaning of nearly all political issues in San Francisco, including the issue of domestic partnership legislation. It is, as ever, impossible to know what would have occurred over the six years between attempts that might have exerted similar effects.

In 1982, San Francisco already had the most politically powerful lesbian and gay community among all large American cities. Many lesbians had long been active in women's political issues. After 1982, the number of gay men who became involved in political efforts grew substantially

3. SAN FRANCISCO, CAL., ADMINISTRATIVE CODE, Ordinance File No. 257-82-4 (1982) (proposed).

4. Berkeley (1985), West Hollywood (1985), and Santa Cruz (1986). See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, DOMESTIC PARTNERSHIP ISSUES AND LEGISLATION (1992) [hereinafter LAMBDA LEGAL DEFENSE].

because their lives were affected by AIDS. For many gay men through the early 1980s, if they had been politically involved at all, they had devoted their energies to persuading the government to leave gay people alone to live their lives as they pleased. By the late 1980s, many gay men sought a far more active and responsive role from the state.

Just as AIDS made people more politically aware in general, it also helped determine the particular political issues in which they became involved. Some of the issues were new and directly related to AIDS—efforts, for example, to persuade the California legislature and Congress to authorize more funds for AIDS research and treatment and efforts to head off legislation requiring mandatory testing of persons believed likely to be infected. What was distinctive about Supervisor Britt's domestic partnership legislation was that it was an old issue that was infused with new content because of AIDS, in much the same way that the efforts to provide legal protections for the handicapped have been enlarged by the inclusion of persons with AIDS among those believed to deserve protection against discrimination.

For gay men and lesbians, AIDS seems to have altered the significance of the domestic partnership issue in two particular ways. In the widest sense, the large number of gay partners caring for their ill companions appears to have made many lesbian and gay persons appreciate an aspect of their lives that had never before seemed so salient. Jean Harris, a lesbian activist and, in 1989, assistant to Harry Britt, the President of San Francisco's Board of Supervisors, has observed, "AIDS made us realize that our lovers are our support systems. It made us more aware of the importance of primary relationships. It made love and relationships even more important than they had seemed before."⁵ In some ways, especially for gay men, the notions of domesticity and of mutual dependence associated with long-term relationships seemed inconsistent with the individual liberation for which they had strived in the 1970s. That had changed by 1989.

Much more specifically, AIDS had brought home the price that gay men and lesbians had been paying for the social and legal nonrecognition of their relations. That price revealed itself when the biological families of gay men with AIDS tried to exclude their sons' partners from hospital visitation or from participating in decisions about medical treatment. Conflicts continued after death, with struggles over burial and property. Most urgently, many gay men faced difficulty in gaining access to medical insurance, since many employers provided coverage to spouses of their workers but none provided coverage to a worker's unmarried partner.

5. Interview with Jean Harris, Assistant to Harry Britt, President, San Francisco Board of Supervisors, in San Francisco, Cal. (May 31, 1990).

Many persons with AIDS ceased to be able to work, lost their health insurance coverage and could not obtain coverage through their partner.

For persons outside the lesbian and gay community, AIDS had also altered the meaning of the domestic partnership issues. In San Francisco, many people knew and most had probably read about or seen news accounts of gay men who were providing care for a dying partner. They had heard about and seen pictures from the Names Project—the project in which family members and friends sewed quilt pieces in memory of persons who had died of AIDS. For many, the image of the gay male community had expanded beyond hedonism to include tenderness, self-sacrifice and suffering. With familiarity, many were now more responsive to claims of a need to recognize gay partners than they had been in 1982.

For others, of course, the association between AIDS and the partners of gay men remained very different and negative. What came to mind when they thought about gay men's relationships was not the sympathetic image of bedside care but the sexual acts that were the means of transmission. The public service announcements posted all over San Francisco to encourage gay men to use condoms simply reminded some people not of lives that might be saved but of conduct they considered immoral. Some who were unsympathetic also worried, more mundanely, about the financial costs of responding to the people who were ill. They rejected the idea of sharing in the expense of providing benefits for undesirable people.

During the campaigns of 1989 and 1990, these various conflicting associations of AIDS helped shape the proponents' approach to drafting and selling the domestic partnership legislation, as well as the response of the opponents. Thus, when the domestic partnership bill was first reintroduced, in the Spring of 1989, it was framed slightly differently than it had been in 1982. The bill continued to prohibit the city and county from drawing legal distinctions between married persons and persons who had registered as domestic partners. To direct attention to the affective aspects of relationships, however, domestic partners were defined "as two people who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."⁶ A new provision clearly drawing on images from the epidemic provided that, if a person was hospitalized and had made no designation of desired visitors, a person registered as a domestic partner would be permitted to visit.

The bill did not address medical insurance benefits for domestic partners, since insurance matters were beyond the authority of the Supervisors, even for city employees. Thus, even though the new bill prohibited discrimination on the basis of marital status, it would not, if passed, have imposed new health insurance costs on the city. By a separate action, the

6. SAN FRANCISCO, CAL., ADMINISTRATIVE CODE, ORDINANCE File No. 216-89-1, § 2(a) (1990). See *infra* Appendix A.

Mayor, at the Board of Supervisors' direction, established a Task Force on Family Policy to study, among many issues, the feasibility of making insurance benefits available to domestic partners and to other extended family members living with the employee, and to make recommendations to the Health Service Systems Board, the agency with the authority over insurance benefits for city employees.

The new domestic partnership bill passed the Board of Supervisors unanimously in May 1989 and was promptly signed by the mayor.⁷ Many conservatives were deeply dismayed. A group of clergy, Catholic and conservative Protestant, and laypersons banded together and gathered the signatures needed to place the ordinance on the ballot for the November election. A campaign then began to persuade voters to support or defeat the legislation.

AIDS affected the tactics of both sides. Proponents of the ordinance placed images from the epidemic at the center of their campaign. The principal flyer distributed by the Domestic Partnership Campaign Committee begins as follows:

Imagine having spent a lifetime with a partner, sharing a home, sharing responsibilities. Your partner becomes ill—and you don't even have the right to visit him or her in the hospital. Your partner dies—and you don't even have the right to leave work for the funeral.

That's the cruel reality for many San Franciscans.⁸

The pamphlet stretches farther and subtly boosts the legislation as itself a tool to reduce the spread of AIDS. It asks, "Should the City of San Francisco encourage long-term, stable relationships, especially in the time of AIDS?" and then answers its own question, "Yes, of course." In much the same terms, a letter in campaign materials signed by a group of Republicans supporting the bill urged, "We believe it is good governmental policy to encourage the strengthening of stable, interdependent, caring and lasting relationships—particularly in the era of AIDS."⁹ The Democratic Central Committee in its own campaign letter was more blunt. The bill, it claimed, "helps in the fight against AIDS. It promotes long-term stable relationships."¹⁰

Some people in the lesbian and gay community felt quite ambivalent about promoting the bill as a tool for encouraging gay men to enter stable

7. See *San Francisco Enacts 'Domestic Partner' Law*, 15 FAM. L. REP. (BNA) 1387 (1989).

8. DOMESTIC PARTNER CAMPAIGN COMMITTEE, YES ON S (1990) (copy on file with author and at the office of *Law & Sexuality*). Almost identical language is used in the official statement of the Mayor and Board of Supervisors in support of the ordinance. See SAN FRANCISCO VOTER'S HANDBOOK 138 [hereinafter VOTER'S HANDBOOK].

9. VOTER'S HANDBOOK, *supra* note 8, at 140.

10. *Id.* at 145.

relationships. To be sure, they wanted to use whatever messages would attract voters, and there was something attractive about this appeal: it invited voters by their vote to do their personal bit to halt the spread of AIDS, a civic gesture that had no cost in dollars. On the other hand, many proponents resented the implication that gay men needed legislation to learn the values of loving relationships. Tens of thousands of gay persons in San Francisco were already in long-term relationships and, these doubters believed, most San Franciscans knew it. What gay men needed, in their view, was recognition and equal treatment for relationships that already existed, not a public health gimmick to encourage monogamy.

The proponents also addressed AIDS in a further way, by seeking to allay fears about the costs associated with the legislation. Their pamphlet's headline in large letters read, "Sometimes Being Fair Doesn't Cost You Anything." It and other ads stressed that the passage of the legislation would not, in itself, provide health benefits or pension benefits to domestic partners. The points about costs would have been important to make even if AIDS had not existed but were especially important in light of the health care costs associated with the epidemic.

At each stage of the political process, the proponents were thus responding to needs created by the epidemic and to the sympathies and fears that the epidemic had engendered. Although the legislation by its terms applied to unmarried heterosexual couples as well as to same-sex couples, to lesbian couples as well as to gay male couples, to domestic partners who were well and domestic partners who were ill, the most frequent image invoked by the proponents of the bill was that of gay men and their partners in the context of AIDS. The proponents would, of course, have favored the legislation, just as they had in 1982, without regard to the epidemic, but AIDS had increased the urgency for the recognition of partnerships and affected the way they presented it to the public.

In mirror fashion, AIDS and fear of AIDS did not provide the central motivation for those who organized the opposition to the ordinance—they would have opposed it even if AIDS had never appeared—but the opponents also invited their own images from the epidemic in their efforts to secure its defeat.

The conservative Protestant and Catholic clergy who were the principal opponents were not concerned about the prospects of higher health costs—the Catholic church had, for example, long favored generous social programs to respond to health needs. What they disliked about the legislation was its central messages: that lesbian and gay relations were socially acceptable and that nonmarital relationships were socially acceptable. They believed that the traditional American family and traditional Christian values were under siege and viewed legislation such as this as encouraging their further disintegration. For them, the bill's denomination of the relationship as a "domestic partnership" did not convert the issue into an

innocuous secular matter of shared finances. Whatever the relationship was called, it remained a direct affront to marriage. They were concerned about the high rate of divorce, the large numbers of children born outside of marriage, and the temptations of lesbian and gay "life-styles" for children struggling with their sexual identity. They viewed the legislation as delivering just the wrong endorsement to a way of life that they abhorred—and abhorred wholly without regard to the presence of AIDS.

The campaign that they waged against the legislation was modest in scope. Several of the organizers refused to speak to the press. They purchased no ads in the local papers or on local radio or television. They did, however, widely distribute two flyers. About 25,000 copies of one flyer were distributed by the Catholic Archdiocese through parish churches. The pamphlet never mentions AIDS or homosexuality and stresses instead that marriages deserve special treatment "in order to provide a secure and nurturing environment for raising children" and argues that the bill gives protection to transitory relationships and "cannot help but erode the commitment of marriage in the public mind."¹¹

The other flyer, supported by the conservative protestant groups, was mailed to 90,000 voters they hoped would be sympathetic. This flyer does evoke images from the epidemic, though it does it subtly. Its cover shows a silhouette of two men holding hands, with a caption reading "The Domestic Partners Law. It isn't FREE . . . and it isn't FAIR."¹² Except in two brief quotations, one from the Catholic Archbishop, the other by the President of the Kong Chow Benevolent Association, the pamphlet contains no explicit references to the family values that were the opponents' central concerns. It nowhere refers to homosexuality as immoral. It makes no unsympathetic references to AIDS as a disease.

What the pamphlet stresses repeatedly, instead, is the hidden dollar costs of the bill—that it would force an immediate increase in the medical insurance premiums that married city employees pay for insurance for their spouses, and that it would serve as the opening wedge for forcing the city, and hence the taxpayers, to pay the premiums for unmarried partners. To bring AIDS to mind, the opponents insinuated that the bill invited abuse. "City workers," the pamphlet warned, "might be pressured into claiming partnerships as a means of helping friends suffering from AIDS and other chronic diseases to obtain insurance." Echoing the cover of the pamphlet, the back shows a pyramid of silhouettes of men holding hands—two men in the top row, four in the second row, twenty-two in the eighth row, each man with a dollar sign superimposed on his torso.

Before election day, nearly all political organizations, newspapers and television stations in the city had announced themselves in favor of the

11. ARCHDIOCESE OF SAN FRANCISCO, *THE CHURCH AND PROPOSITION S* (1990).

12. SAN FRANCISCANS FOR COMMON SENSE, *THE DOMESTIC PARTNERS LAW* (1990).

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legislation. Nevertheless, on election day, the bill went down to defeat—a narrow defeat by a margin of one percent—but defeat nonetheless. It had received overwhelming support in the Castro district, the predominately gay residential area, but was roundly rejected by older voters in the western part of the city and narrowly rejected by the largely black electorate in Hunters Point.

Harry Britt would not give up. In the summer of 1990, he and three other members of the Board of Supervisors voted to place the domestic partnership ordinance on the ballot in the November elections once again. The ordinance they proposed was a variant of the one defeated the year before. They stripped the original bill to its core. Gone were the provisions barring discrimination by the county between married couples and domestic partners. Gone was the special provision regarding hospital visitation. Left was the central section defining domestic partnership and setting up the mechanism for registering the partnership with the County Clerk. Left also was the section requiring the partners to agree to be jointly responsible for basic living expenses for food and shelter, together with some new language that permitted the agreement to be enforced by anyone to whom such expenses were owed. New also was an introductory section declaring that the purpose of the ordinance was “to create a way to recognize intimate committed relationships, including those who otherwise are denied the right to identify the partners with whom they share their lives.” Britt’s idea seems to have been to have invited a clear, simple vote for the legitimacy of lesbian and gay relationships. One of the principal opponents viewed it slightly more broadly and simply as “a referendum on homosexuality.”

Each side prepared for one more campaign. The opponents were somewhat more outspoken this time and the proponents somewhat more muted, but in most respects the campaigns remained much the same. The proponents again emphasized the justness of treating all loving relationships equally and again claimed, as to costs, that there “was no bill to come due for tomorrow’s taxpayers.” Opponents warned again of the threat to family, but also continued to express their disbelief that there were no hidden costs to taxpayers. They distributed widely a pamphlet with the same covers they had used before—the one with silhouettes of hand-holding men wearing dollar signs across their midriffs. The content inside and out was also much the same, although this time the slogan on the cover was not, “It isn’t FREE . . . and it isn’t FAIR,” but more directly, “Costly Benefits for Live-In Lovers.” As before, the city’s daily newspapers and principal radio and TV stations endorsed the proposal.

One of the few major differences between the 1989 and 1990 campaigns bore on the issue of AIDS. A month or so before the 1990 election, the wisdom of adopting the ordinance was strongly questioned by a couple of groups that the proponents had counted on as their allies. In early Octo-

ber, Clint Hockenberry, the director of the AIDS Legal Referral Panel of the Bay Area Lawyers for Individual Freedom and a vocal advocate for gay rights, warned of potential adverse effects of the bill for persons with AIDS. Pointing to the section in which registering partners had to agree to be responsible for each others' basic necessities, he worried that partners of persons with AIDS would find themselves hounded by the creditors of their dying friend—he labelled the bill “a creditor’s bill of rights”—and that the size of grants that a person with AIDS was eligible to obtain under various federal programs might be affected by the attributed income of the partner. Hockenberry did not object to unmarried partners accepting responsibility for each other; he objected rather that persons with AIDS might not understand the possible consequences of registering and that the bill as drafted imposed responsibilities on domestic partners without providing any concrete benefits of the sorts accorded to married persons. Two weeks before the election, the City’s Human Rights Commission, an agency responsible for protecting gay persons against discrimination, issued a staff memorandum entitled “Domestic Partnerships: Obligations without Benefits? Recognition without Equality?” that repeated many of Hockenberry’s fears.¹³

Hockenberry’s attacks and the doubts of the Commission staff left the proponents with little time before elections. Britt’s staff regarded Hockenberry as a traitor. On the merits, they believed that, as a practical matter, very few persons with AIDS would be disadvantaged financially if the ordinance were adopted.¹⁴ They also believed that Hockenberry was wrong in claiming that the bill gave no immediate benefits. One benefit was obvious—the symbolism of recognition. Another was more subtle but no less important. Although the bill did not in itself provide any financial benefits for domestic partners, the proponents believed that passage of the bill would goad San Francisco’s Health Services Systems Board into arranging with insurance companies to permit city employees to obtain health insurance benefits for their partners. The language about joint financial responsibility had in fact been included to make providing insurance coverage more attractive to insurance companies.¹⁵ Once the city provided access to insurance to domestic partners, private employers might be encouraged to follow.

13. Staff memorandum by J. Davis and C. Goldstein (October 1990) (hereinafter Staff Memorandum).

14. Julia Lopez, head of San Francisco’s Department of Social Services, issued a memorandum to the Social Service Commission that “passage of the domestic partners initiative would not have any effect on the eligibility for benefit programs administered by the department.” (September 10, 1990.) The Human Rights Commission staff thought Lopez might have been hasty in her conclusions. Staff memorandum, *supra* note 13, at 18-24.

15. Interview with Matthew Coles, American Civil Liberties Union of California, [San Francisco office] (Nov. 29, 1990). Mr. Coles was the principal drafter of the ordinance.

Even though the proponents believed in these benefits, they were nonetheless in an awkward position to respond: they could claim that the risks were not what Hockenberry claimed, but they were reluctant to advertise the bill as an opening wedge for insurance benefits for city employees, since they had been claiming, accurately if somewhat misleadingly, that nothing in the bill imposed any new costs on the taxpayers. The irony was that a provision in the bill that was intended to help pave the way for insurance coverage for county employees (few of whom at any given time would have a partner with AIDS) had led to the condemnation of the bill as a whole by some other AIDS advocates who worried about a poorer group of persons with AIDS who were not partners of city employees—and that this condemnation might have jeopardized the entire bill.

The worries in the end proved groundless. The city's newspapers gave little coverage to the dispute and the coverage they did give made the matter seem technical and speculative. On election day, the ordinance carried by a wider margin—9 percentage points—than any other proposition on the ballot. (The final version of the ordinance is set forth in Appendix A.) A poll before the election had indicated that younger registered voters were overwhelmingly in favor of the ordinance and older voters overwhelmingly against it¹⁶—an unusually wide disparity based on age. And one major difference between the 1989 and 1990 elections is that the 1989 elections were in an off year when little else was on the ballot and fewer younger persons eligible to vote actually did.

The 1990 elections as a whole were regarded by San Francisco's gay political community as a triumph. In addition to the passage of the domestic partnership ordinance, two lesbians, Roberta Achtenberg and Carole Migden, won positions on the Board of Supervisors and a gay man, Tom Ammiano, was elected Chairman of the School Board.¹⁷ Some of the proponents of the domestic partnership bill believed that the popularity of the bill had helped secure the victory of the gay candidates. By the end of 1990, as the proponents had quietly hoped during the campaign and the opponents had ominously forecast, the Health Services Board had voted to make health insurance available to domestic partners, an action that carried a \$1.1 million initial cost to the County.¹⁸ And, pushing one step

16. A survey conducted by the *San Francisco Chronicle* reported that, of registered voters 18 to 34, 70 percent favored the bill and 24 percent opposed it, while of voters 55 and over, only 25 percent favored the bill and 65 percent opposed it. Voters 35 to 54 favored the bill 56 percent to 35 percent. Marc Sandalow, *Small SF Majority for Domestic Partners Measure*, S.F. CHRON., Oct. 8, 1990, at A4.

17. Marc Sandalow, *Gays Celebrate "Lavender Sweep" in San Francisco Election*, S.F. CHRON., Nov. 8, 1990, at A17.

18. San Francisco's health plan for its employees does not provide coverage even for spouses. What it does do is to enable employees to purchase coverage for their spouses (and dependent children) at group rates. The Board's action in December permits employees with domestic partners to purchase insurance at the same rates. The extra \$1.1 million in costs to the county was due to the fact that the insurance companies demanded a higher premium for all dependents if domestic partners

further toward equality for domestic partners, the County Board of Supervisors, now with three gay members, passed a unanimous resolution to recommend to the California legislature that it alter the marriage laws to permit same-sex persons to marry. In 1991, the opponents placed the issue on the ballot one more time. The same faces lined up the same way, and voters affirmed the ordinance by a substantial margin.

II. NEW YORK CITY¹⁹

In the 1980's, the issue of legal recognition for domestic partnerships arose in New York in a quite different context, a context in which, unlike San Francisco, it was the judiciary, not the legislative or executive branches or the voters, that took the dominant role. In 1989, in the case of *Braschi v. Stahl Associates Co.*,²⁰ New York's highest court, the New York Court of Appeals, decided that, for certain purposes, a same-sex companion counted as a member of his partner's "family." Here again, the particular issue might have arisen without regard to AIDS—in fact, had arisen often outside the context of AIDS—but AIDS made the problem seem more urgent and affected the tone of the debate and possibly even its resolution.

The *Braschi* case arose in the context of New York's twin and labyrinthine schemes of rent regulation—rent control and rent stabilization. The case posed a problem that sometimes arose on the death of a tenant in a rent regulated apartment: A tenant's spouse or partner or daughter or mother has lived with the tenant for many years but has never been a party to the lease, and, after the tenant's death, wants to remain in what has become her family home. She also wants the continued protection of regulated rent levels, which are far below the rents for comparable unregulated apartments. The landlord, in turn, typically wants the family member to move out because the rent-regulation statutes provide that, once such an apartment becomes empty, the landlord is free to raise substantially the rent to a new tenant—in some cases to whatever the market will bear—and to continue to raise rents annually at the percentage rates provided for rent-stabilized or, in certain cases, at free-market rates.

New York law provided different schemes of regulation for rent control and rent stabilization. Under both schemes, the regulations prohibited landlords from evicting some relatives on the death of a tenant. In the context of rent stabilization, landlords had persistently challenged the

were to be covered and the county wanted to make certain that adding domestic partners did not force employees with spouses to pay higher premiums than they already were.

19. The research for this section that rests on the examination of legislative and judicial materials was largely conducted by Daniel Conviser, then a third-year student at the University of Michigan Law School. Daniel Conviser, Overview and Chronology of Events in the Controversy over Succession Rights in New York City Rent Stabilized Apartments (1990) (unpublished manuscript, on file with author and at the office of *Law & Sexuality*).

20. 543 N.E.2d 49 (N.Y. 1989).

agency's authority to issue any regulations and had often been successful in the courts. Over the years before the *Braschi* case, the relevant state agency and the legislature had struggled with defining a group of family members who would be entitled to remain in a rent stabilized apartment on the death of the tenant. At least six different proposals were adopted by the agency or passed by one house of the legislature over a few-year period before 1989. None of these proposals ever included a nonmarital partner among the protected survivors. The legislative and administrative efforts had centered on which persons related by blood or marriage would be reached and how long such a person had to have lived in the apartment to be eligible for protection.

The struggle in the legislature over noneviction was less a public debate over the appropriate definition of family than simply one more skirmish in the unending political struggles between tenants and landlords. In general, landlords detested rent control and rent stabilization and found a sympathetic ear in the state Senate, which was controlled by Republicans and which typically supported landlords' positions. Landlords had no particular moral view to purvey about whether stepparents or siblings or even gay or lesbian partners deserved protection. They simply wanted a profit from their investments, in a context in which any persons entitled to remain posed an impediment. Many tenants did, of course, care about protecting their family members, but noneviction rights were simply one of many matters about which tenants groups cared each time the legislature was considering rent regulation issues. In their lobbying, tenant groups had never given any special priority to protecting the interests of unmarried partners in general or lesbian and gay partners in particular. Tenants obtained their principal support in the Democrat-controlled Assembly. On three occasions, the Assembly voted for some form of protection for family members and, on each occasion, the Senate refused to act on the proposal.

During the years between 1985 and 1989, however, while the legislature and agency grappled fumblingly with a series of proposed solutions, the numbers of cases of AIDS in New York City increased severalfold. The Legal Aid Society, a program to provide legal services for the poor, and the Gay Men's Health Crisis, a large AIDS service organization in New York City, began to receive regular requests for help from partners of men who had died of AIDS and who wanted to remain in a shared apartment. In many cases, the partner had taken care of the tenant over the course of a long illness and was now sick himself.

Thus, during this period, the lower courts in New York began to hear cases involving the gay partners of persons who had died of AIDS. The great majority dealt with rent-stabilized apartments, not rent-controlled apartments, because vastly more units in New York were covered by the rent stabilization program. Facing cases of a surviving gay partner, a few judges started providing relief. One court, for example, held that, so long

as the agency continued to give protection to a list of relatives such as stepchildren or fathers-in-law then the equal protection clause of the Constitution required that a long-term gay domestic partner be given the same protection.²¹ The court reasoned that there was simply no rational basis for giving relief to a stepchild or father-in-law who may have depended little on the deceased while denying it to a lifelong gay companion who was much more likely to have been emotionally tied to the deceased. Some other lower courts agreed but others did not.

New York papers also began to carry stories about these cases. The columnist, Jimmy Breslin, for example, wrote a piece about a case involving a lower-income person with AIDS who was being forced from the apartment he had shared for 12 years with his recently deceased gay partner. Breslin urged the legislature to enact laws to assure succession. "As upstate legislators feel it a mortal sin to assist gays," he continued, "the city can wind up with satisfied landlords and deaths in the streets."²²

During this same period, the only legislative proposal that would have provided protection to an unmarried partner came from Governor Cuomo. In January 1989, he proposed that succession rights should be available to any person (partner or otherwise) who had lived in the tenant's apartment for five years or more. The governor's proposal was never introduced into the legislature and, by the summer of 1989, the agency's powers to issue protective regulations of any sort were still in doubt and the legislature, caught in its usual crossfire, had enacted no legislation. In fact, by this point some politicians and other officials were looking to the New York Court of Appeals in hopes of a resolution.

The *Braschi* case, the case that everyone was watching when it came before the Court of Appeals, arose under the rent control program, the smaller, older and more rigorous rent regulation scheme, a program that was in disfavor with the legislature and that was slowly being phased out. For many years that program had included a specific regulation that dealt with noneviction of family members.²³ In the mid-1980's, the applicable section provided that, on the death of a tenant in a rent-controlled apartment, the landlord could not dispossess "either the surviving spouse or some other member of the deceased tenant's family who has been living with the tenant."²⁴ The unresolved question the agency and courts faced was whether or not a domestic partner counted as part of the tenant's "family." The agency had consistently interpreted the term "family" to reach only a list of persons related by blood or marriage.

21. See *Two Associates v. Brown*, 502 N.Y.S.2d 604 (N.Y. Sup. Ct. 1986), *rev'd*, 513 N.Y.S.2d 966 (N.Y. App. Div. 1987), *appeal dismissed*, 70 N.Y.2d 792 (N.Y. App. Div. 1987).

22. Jimmy Breslin, *Legislating Limits on Who Is Family*, *NEWSDAY*, Jan. 17, 1989, at 2.

23. For a case involving an earlier version of the regulations, with almost identical language, see *In re Herzog v. Joy*, 428 N.Y.S.2d 1 (N.Y. App. Div. 1980), *aff'd*, 53 N.Y.2d 821 (N.Y. 1981).

24. *NEW YORK CITY*, N.Y., 9 NYCRR § 2204.6(d).

The particular case that came before the Court of Appeals involved a gay man, Miguel Braschi, who had lived with his partner, the tenant, for 10 years and had cared for his partner through a long illness. At Mr. Braschi's request, the papers filed with the court are silent about the nature of his partner's illness, but anyone reading the record would have inferred that his partner had died of AIDS.

In preparing to bring the case before the Court of Appeals, Mr. Braschi's lawyers believed that the many accounts in newspapers and on television of gay partners taking care of a partner with AIDS were likely to have made sympathetic impressions on the judges, impressions that could be helpful as the court decided how expansively to interpret the term "family." Thus, in their brief, Mr. Braschi's lawyers emphasized the close and loving relationship between the partners and the "painstaking care" that Mr. Braschi had provided during his partner's illness and hospitalizations. They urged the court to reject a narrow and technical view of "family" based on blood or marriage and to accept instead a functional definition more in keeping, in their view, with twentieth century patterns of life. In oral argument before the court, the lawyers drew upon examples from the epidemic to remind the judges of the many partners who faced eviction and the judges, in turn, responded with their own questions that drew upon the epidemic.

To drive home the AIDS-related concerns, a group of AIDS care providers, including organizations from several boroughs of the city, filed a brief with the Court that stated that, while exact numbers were impossible to calculate, there were surely thousands of gay men with AIDS living in New York with partners much like Mr. Braschi. They referred the Court, by name, to 16 other cases involving succession rights then pending or recently decided in the lower New York courts, all of which involved an unmarried partner, nearly all of which involved a tenant with AIDS, and some of which involved a surviving partner who was himself ill and desperate to remain in the joint apartment. They also brought in materials on the growing problem of homelessness among persons with AIDS. The City of New York filed a similar brief emphasizing the problem of homelessness for HIV-infected persons.

The record before the Court also included a submission from Russell Pearce, general counsel of the City's Commission on Human Rights, who reported increasing numbers of complaints of discrimination against persons with AIDS—414 complaints in the first six months of 1988, nearly as many as in the entire preceding year. Mr. Pearce argued that if the Court did not rule for Mr. Braschi "thousands of people affected by AIDS who live in non-traditional family units will face eviction at a most difficult time in their lives."

The apartment Mr. Braschi wanted to retain was owned by a real estate company. The company's lawyers, in their briefs and arguments to

the Court, tried to stay away from AIDS. They mentioned the disease only once in their brief, in a footnote that seemed to try to deflect sympathy based on AIDS by pointing out that there was no evidence in the record that Mr. Braschi's partner had AIDS. They also sought to undercut sympathy for Mr. Braschi in particular by pointing out that his partner was a rich man and that, as his heir, Mr. Braschi could afford other housing at prevailing market rates. On the legal issues, they urged the court to accept a traditional definition of "family," as both more consistent with the housing agency's practices and more certain of application. Unlike the opponents in San Francisco, they were not motivated in their opposition by moral concerns about family values or about homosexuality, nor did they make such appeals to the Court. Neither the Roman Catholic archdiocese nor other conservative religious groups appeared before the Court to make such arguments.

In its decision, the Court accepted Mr. Braschi's position. Cutting through all that the legislature had been unable to resolve, the court began by observing that the term "family" in the rent control statute was neither defined elsewhere in the statute nor discussed in any legislative materials over the years. With such a vacuum, the court believed that it would be most consistent with the legislature's purpose of protecting "a narrow class of occupants other than the tenant of record"²⁵ to look not to "fictitious legal distinctions or genetic history" but rather to the "reality of family life."²⁶ Accordingly, the court decided that the proper definition of family should include, among others, "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."²⁷ The court prescribed a list of factors for the lower courts to consider in deciding individual cases—factors such as the longevity and exclusivity of the partners' relationship, their level of emotional and financial commitment, and the reliance the couple placed upon one another for daily services.

The court ended its decision by sending Mr. Braschi's case back to the trial court to permit the trial judge to determine whether Mr. Braschi met these criteria, but, in summarizing the facts alleged by Mr. Braschi, left little doubt about the appropriate outcome. If Mr. Braschi could prove what he had alleged—a relationship of 10 years, with the partners regarding each other as "spouses," holding themselves out as a couple to friends and relatives, and sharing finances, and with Mr. Braschi the primary heir of his partner's estate—Mr. Braschi should be considered a member of the tenant's "family" and assured succession. The court never men-

25. *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49, 52 (N.Y. 1989).

26. *Id.* at 211.

27. *Id.*

tioned the word "AIDS," but almost everyone with any connection to the case believed that AIDS had been on their minds.

By any standard, the Court of Appeals opinion was adventurous. If nothing else, its dismissive characterization of marriage as a "fictitious legal distinction"²⁸ is breath-taking. Marriage, if seen as a fiction, is certainly the most vigorous legal fiction in Anglo-American law. Moreover, as a dissenting judge pointed out, the decision seemed inconsistent with the legislature's overarching goal of phasing out the rent control program as original tenants of apartments died, inconsistent with the "traditional" definition of the term "family," and inconsistent with the practice of the agency administering the rent control statute, which had always limited its interpretation of "family" to a small group of relations by blood or marriage. Worse yet, the dissenter complained, while the narrower view of family merely requires a simple determination of a blood tie or a link by marriage, the new interpretation places an already overworked agency in the unfortunate position of having to make inquiries on a case by case basis into a number of highly personal, subjective factors, such as two persons' level of emotional commitment to each other.

The decision, when announced in July 1989, received a great deal of attention in the press. Legislators had predictably opposing reactions. Peter Grannis, who chaired the Assembly's Housing Committee and had unsuccessfully tried to steer legislation on succession rights through the legislature, wrote to Governor Cuomo calling the ruling "courageous . . . compelling . . . eloquent and uplifting . . . a breath of fresh air that makes me feel proud to be a New Yorker." By contrast, conservative State Senator Marchi, alarmed by the decision, proposed an amendment to New York's Constitution that would have limited the meaning of "family" in all statutes and regulations to spouses, their children, their parents, and their in-laws.²⁹ Neither Marchi's proposal nor any other legislation was in fact ever considered in either house. In the succeeding months, nearly all the legislative and administrative activity shifted once again to the rules relating to rent stabilization, the larger rent regulation program, for nothing in the *Braschi* case, a rent control case, dealt directly with rent stabilization and the legislature remained as paralyzed as ever between the conflicting demands of tenants and landlords.

After months of delay and intense lobbying from a variety of groups, including gay rights organizations, the state's Division of Housing and Community Renewal issued new regulations to cover both rent-controlled and rent-stabilized apartments.³⁰ Despite intense resistance from representatives of the landlords, *Braschi* carried the day for both programs.

28. *Id.*

29. Michael O'Malley, *Lawmaker Wants to Exclude Gays in Definition of Family*, UPI Dispatch, Dec. 13, 1989.

30. See *infra* Appendix B.

The new regulations began with findings of fact to support the regulations. In its findings, the agency emphasized the general problems of homelessness and the epidemic of HIV, which had, by the estimates on which it relied, infected between 124,000 and 235,000 New Yorkers. Of this group, the great majority, the agency stated, were gay men or members of "low-income groups"—"two groups most likely to live in non-traditional households" and were thus most in peril of losing their homes. In the new rules themselves, the agency expanded its old list of persons related by blood, marriage or adoption and provided succession rights to include other persons "who can prove emotional and financial commitment and interdependence" with the tenant. The regulations went somewhat further than *Braschi* and made clear that a sexual relationship between the parties was irrelevant and thus that long-term residents who had a relationship with the tenant much like that of a child or a sibling would also be protected. Finally, in a provision reminiscent of San Francisco's domestic-partner registration, the regulations provided that persons who wished to be in a position to claim succession rights could file with the landlord a form provided by the agency informing the landlord of the familial relationship.³¹

At the time the new rules were issued, William Rubenstein, Mr. Braschi's attorney in the Court of Appeals, exulted that they were "the most far-reaching recognition of lesbian and gay relationships ever granted by any government agency in the United States."³² John Gilbert, head of a landlord's group, complained that "the government is basically saying that property owners must bear the brunt of the societal question of what is family."³³ In *Rent Stabilization Ass'n of New York, Inc. v. Higgins*, the New York Court of Appeals upheld the new regulations.³⁴

Braschi may already have exerted some effects in New York beyond rent regulation. Immediately after *Braschi* was decided, Mayor Koch announced another form of recognition of the domestic partnership relationship. By executive order, he expanded the "bereavement leave" policy available to city employees to cover "bereavement leaves" for a domestic partner (or a domestic partner's child or parent) in the same manner as bereavement leave for a spouse.³⁵ City employees who wanted to take leaves under the policy were to register their partnership with the city's Department of Personnel. The changes in bereavement policies were al-

31. The final version of the new regulation is set forth at the end of this article in Appendix B.

32. Philip S. Gutis, *New York Housing Officials Redefine Family to Block Evictions*, N.Y. TIMES, Nov. 1, 1989, at B1, B7.

33. *Id.*

34. On December 4, 1990, in *Rent Stabilization Ass'n of New York, Inc. v. Higgins*, 562 N.Y.S.2d 962 (1990), the New York Supreme Court, Appellate Division, upheld the authority of the agency to issue the regulations providing succession rights to partners. The landlords have requested review from the Court of Appeals.

35. New York City Executive Order 123, August 7, 1989.

ready being drafted in the mayor's office when *Braschi* was announced, but the generally positive public response to *Braschi* may have encouraged the mayor's office to proceed with releasing them and helped ensure a positive climate at the time they were released.

Looking back, what place has AIDS played in shaping the political and judicial struggles that have lead to the new broad housing rules to protect domestic partners and other nontraditional family members? As in San Francisco, that question cannot be confidently answered. It can at least be said that it is highly unlikely that the agency would have acted when it did to protect such families if it had not been for the *Braschi* decision and for the lobbying of the agency by gay rights and AIDS groups who were outside the usual stand-off struggles between tenants groups and landlord groups.

The question that is harder to answer is whether *Braschi* itself would have been decided the way it was but for the epidemic of AIDS. The case that came before the Court of Appeals, the case of Mr. Braschi, not only evoked some sympathy in itself—a loving partner who had cared for his dying companion—but also surely evoked images of many other similar companions and of yet other homeless persons dying of AIDS in city shelters. In their briefs, the supporters of Mr. Braschi had gone out of their way to evoke such images in the belief that they would affect the judges. More globally, in the years that immediately preceded *Braschi*, what AIDS had also done, as it had done in San Francisco, was to raise the political consciousness of many gay men and lesbians and lead to the creation of the organizations that urged the courts and legislatures to adopt the enlarged view of families.

It thus seems quite possible that AIDS has contributed in New York both to the recognition of the domestic partnership and to the recognition of other nontraditional family relationships for which no lobbying voice exists. Just as with the domestic partnership issues in California, the recognition of succession rights would have been important to lesbian and gay male couples in New York City even if AIDS had never happened, but AIDS, for all its tragic effects, may have led the larger community in both cities to confront and accept, at least for certain purposes, families who had once been unseen or, if seen, rejected as different.

III. TALES OF OTHER CITIES

It's year eleven of the epidemic. I suspect that for most gay law reformers, surely most gay male law reformers, nearly every legal issue is infused with special content because of AIDS, just as for Jewish activists most issues stir memories of the Holocaust and for African-American activists most civil rights issues evoke images from slavery. It's there even when we don't see it there. For gay men, AIDS is our plague of locusts,

our scarlet letter, our trial on earth, our finest hour, our worst despair. What is noteworthy about the two stories just told is that the images of AIDS were not alone in the minds of the gay participants. They seemed to have exerted powerful effects on everyone else involved in the process and did so, even though the issue posed—defining family—had on its face nothing to do with AIDS.

As other courts and city governments are asked to recognize domestic partnership relationships, what place is AIDS playing in their discussions? I am less confident of the role in the courts, where issues are often rather narrow, than I am in the city council chambers. Courts today are fairly frequently receiving requests to recognize same-sex couples. Some couples continue to challenge state marriage laws.³⁶ Some public employees are directly challenging the failure of governments to provide benefits to same-sex partners that are provided to married partners.³⁷ Lesbian couples join together in a plan to conceive a child and then either seek to have the nonbiological parent recognized for purposes of adoption,³⁸—or break up and fight over whether the nonbiological parent will be accorded visitation rights comparable to those a married noncustodial parent would receive.³⁹ These cases have produced widely varying results, but few of the opinions I've read (and I probably haven't read them all) have involved a person with AIDS and none of the opinions expressly mentions AIDS in reaching its result. Others will have to tell the story of these cases to reveal to what extent AIDS is hovering in the background of the court decisions in which it is never mentioned, just as it hovered in *Braschi*. Many of the cases involve lesbian couples, a group most judges probably do not associate with AIDS, and some of these cases may suffer from having no issue that seems to courts to pose a pressing social need for response.

For example, one much-publicized case involving a lesbian couple was decided by the same court that decided *Braschi*, but reached a result that many observers consider inconsistent with *Braschi*'s spirit. The New York Court of Appeals, a year after *Braschi*, faced a statute that limited standing in custody and visitation cases to persons who were "parents."⁴⁰ The plaintiff, a lesbian who had participated with her partner in the decision to have a child and had, until separation, actively participated in raising

36. See, e.g., *Implicit Ban on Same-Sex Marriage Withstands Constitutional Scrutiny*, 18 FAM. L. REP. (BNA) 1387 (Dean v. District of Columbia, No. 90-13892, D.C. Superior Ct., June 2, 1992).

37. See, e.g., *Gay Teachers Ass'n v The Board of Education of the City School District of the City of New York*, (Case No. 43068/88, N.Y. Sup. Ct., New York County (Karla Moskowitz, J.)), *order aff'd*, 585 N.Y.S.2d 1016 (N.Y. App. Div. 1992).

38. See, e.g., *Lesbian Partners Are Allowed to Adopt Each Other's Children*, 17 FAM. L. REP. (BNA) 1523 (In re Adoption of Minor (T.) (Petition of L.S.), D.C. Superior Ct., Fam. Div., Nos. A-269-90 & A-270-90, Aug. 30, 1991).

39. See, e.g., *Allison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *cert. denied*, 827 P.2d 837 (N.M. 1992).

40. *Allison D.*, 572 N.E.2d 27.

the child, invited the court to take the same sort of expansive view of the term "parent" in the custody statute that it had taken of the term "family" the year before. The court brusquely said "no," relying rigidly on earlier precedent. In trying to explain the differences between the two outcomes, a lawyer who participated in both cases offers many possibilities but one is that *Braschi* arose in the context of the social crisis of AIDS and homelessness and the plaintiff in the custody case could simply point to no reason for relief that grabbed the Court as being of comparable social urgency.⁴¹ The bond between a loving parent figure and a child was apparently not as compelling. Without the presence of AIDS, were the women just a couple of dykes?

The link between AIDS and efforts to persuade city or county governments to recognize domestic partner relationships may be easier to detect. All such efforts reach gay men and nearly all such efforts trigger a wide ranging community debate. City councils are messier than courts. By early 1992, six cities other than San Francisco had adopted ordinances that permit domestic partners to register⁴² and some of these cities and several others were providing health benefits or sick and bereavement leave benefits for the domestic partners of city employees.⁴³ The cities that have acted are not, of course, a random sample of American metropolises. They are all located either in politically liberal university towns (such as Ann Arbor, Berkeley, Cambridge, Ithaca, and Madison) or in cities with large and well-organized lesbian and gay communities (such as San Francisco, Seattle, and West Hollywood).

As of 1992, no state had adopted legislation permitting domestic partners to register and no state had extended benefits to domestic partners of state employees or insisted that private employers do so. In fact, the actions by cities can be seen in part as a response to the failure of states to change their marriage laws to permit same-sex couples to marry. Whether

41. William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J. L. & POL. 89, 103-04 (1991).

42. The cities are Ann Arbor, Cambridge, Berkeley, Ithaca, Madison, Minneapolis, and W. Hollywood, California. See LAMBDA LEGAL DEFENSE, *supra* note 4. Cambridge adopted its ordinance in September 1992.

43. These cities are Ann Arbor (health benefits, parental leave and bereavement leave), Berkeley (health benefits and sick and bereavement leave), Cambridge (health benefits, sick leave, bereavement leave, and parental leave), Ithaca (sick and bereavement leave), Laguna Beach, California (health benefits), Los Angeles (sick and bereavement leave), Madison (sick and bereavement leave), New York City (bereavement leave), Santa Cruz, California (health benefits, sick and bereavement leave), Seattle (health benefits, sick and bereavement leave), Takoma Park, Maryland (sick and bereavement leave), W. Hollywood, California (health benefits, sick and bereavement leave), W. Palm Beach, Florida (bereavement leave). Washington, D.C. can, sadly, be left off the list (On September 24, 1992, the House of Representatives voted 235 to 173 effectively barring the city government from implementing its "Health Care Benefits Expansion Act of 1992." *Domestic Partnerships Gain Recognition in Massachusetts and Canada*, 18 FAM. L. REP. (BNA) 1552 (1992)). For all but Ann Arbor and Cambridge, see *id.* Ann Arbor adopted its benefit plan in August 1992, Cambridge, in September 1992. A few private corporations and nonprofit organizations had also extended health benefits to domestic partners. See *id.* The entities include, among others, the American Friends Service Committees, Levi Strauss & Co., Lotus Development Company, and *The Village Voice*.

many other cities will enact partnership ordinances and whether any states will begin to do so is impossible to say. And, if they do, even less, of course, can be said about the role that AIDS will have played.

My own guess is that lesbians and gay men will continue to press cities for recognition of domestic partnerships and that AIDS will continue to play a role in the rhetoric on both sides. Local politicians wishing to take actions that show their support for gay men and lesbians will find a registration provision attractive to embrace because, at least initially, it costs the city government almost nothing and because, even if the registration ordinance includes both heterosexual and same-sex couples, it will be seen solely as a lesbian and gay issue. As one of the opponents in San Francisco said during the effort to repeal the registration ordinance, "This is a referendum on homosexuality." And, in fact, few heterosexual unmarried couples seem to care much about registration. In cities with pure registration provisions, same-sex couples register in far larger numbers than heterosexual couples, even though the absolute numbers of opposite-sex cohabiting couples in any city (including San Francisco) always exceeds the numbers of same-sex couples.⁴⁴ No organizations of unmarried couples, if any such organizations exist, have pressed for the adoption of the ordinances. Nor are they high on the agenda of organizations like the National Organization for Women, even though many women want an alternative to marriage in heterosexual relationships.

What makes the domestic partnership issues especially appealing for sympathetic local politicians (and for sympathetic judges, like those in *Braschi*) is that among gay and lesbian issues, it emphasizes the domestic rather than the hedonistic, the connubial rather than the carnal, the self-sacrificing caretaker of the person with AIDS rather than the young gay man having intercourse with multiple partners at the baths.

At the same time, however, municipal officials may appropriately regard partner registration as a Trojan horse—or at least a Trojan pony. For, upon the passage of a registration ordinance, they will almost certainly be pressed to provide health benefits for the domestic partners of city employees. And it is here, as we have again seen, that images from the AIDS epidemic will be less helpful, for officials may fear (and opponents will surely hint) that large numbers of gay male employees will have partners with AIDS or, worse, that large numbers of male employees will accommodate a friend with AIDS by falsely claiming him as a partner.⁴⁵ They will be fearful even though the fear seems to be entirely unjustified: cities that are providing health benefits to same-sex couples do

44. In Ann Arbor, for example, in the first seven months after the adoption of the registration ordinance, 29 couples registered, of whom 23 were same-sex couples.

45. See SAN FRANCISCANS FOR COMMON SENSE, *supra* note 12.

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not report cases of fraud⁴⁶ and the costs of providing benefits to unmarried partners have proven to be no higher than providing benefits to married couples.⁴⁷

The real Trojan horse in partner benefits, if there is one, is that while city councils may be motivated to extend benefits to unmarried couples out of a desire to appeal to and provide for lesbians and gay men, they will almost certainly find that, if they do extend benefits, it is unmarried heterosexual employees who sign up in the largest numbers. In Berkeley, for example, only 15 percent of the unmarried city employees who have sought benefits for a partner have a partner of the same sex.⁴⁸ (Few heterosexual couples seem to care about registering when the registering is wholly symbolic, but they turn out in numbers when a substantial benefit is attached.) Of course, cities can avoid the costs of providing benefits for unmarried heterosexual couples by granting the benefit to same-sex employees only and can justify doing so on the ground that the opposite sex couples can choose to marry if they wish. Interestingly, as of mid-1992, only one of the seven cities that has adopted partner benefits has limited them to same-sex couples.⁴⁹

In the end, however, whatever scope the actions of cities take—whether registration alone or registration with benefits, whether benefits limited to same-sex couples or benefits for all unmarried couples—it is probable that AIDS will play a role in the debate that leads to their adoption. If this has been and continues to be the role of AIDS, it is in some sense an amiable paradox: that a hideous and fatal disease, associated in the public mind with promiscuous sexual acts, a disease so stigmatizing that Mr. Braschi requested that its name not be mentioned, has nonetheless contributed to the recognition and acceptance of a variety of emotionally intimate and interdependent family ties that were once outside the law.

46. In the course of presenting materials to the Ann Arbor City Council when it was considering health benefits for domestic partners of city employees, Michael Silverman, a University of Michigan Law Student, called city officials in each of the six cities that then provided benefits and learned that in only one were there even rumors that any employees were falsely claiming someone as a domestic partner. (June 1992.)

47. In Berkeley, for example, the insurer initially imposed a surcharge on the premium for partners in unmarried couples, then, after a year, reduced the surcharge, then eliminated the surcharge altogether. Reported in Mayor's Task Force on Family Policy, *Approaching 2000: Meeting the Challenge to San Francisco's Families* 32 (1992).

48. See *Recognition of Domestic Partners*, in LAMBDA LEGAL DEFENSE, *supra* note 4 (non-paginated).

49. That city is Ann Arbor. See *supra*, notes 41-42 and accompanying text.

APPENDIX A: SAN FRANCISCO DOMESTIC PARTNERSHIP ORDINANCE (1990)

The People amend The San Francisco Administrative Code by adding a new Chapter, to read:

RECOGNITION OF DOMESTIC PARTNERS

Sec. 1. PURPOSE

The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives. All costs of registration must be covered by fees to be established by ordinance.

Sec. 2. DEFINITIONS

(a). *Domestic Partnership*. Domestic Partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership. They must sign a Declaration of Domestic Partnership, and establish the partnership under section 3 of this chapter.

(b). *"Live Together."* "Live together" means that two people share the same living quarters. It is not necessary that the legal right to possess the quarters be in both of their names. Two people may live together even if one or both have additional living quarters. Domestic Partners do not cease to live together if one leaves the shared quarters but intends to return.

(c). *"Basic Living Expenses."* "Basic living expenses" means the cost of basic food and shelter. It also includes the expenses which are paid at least in part by a program or benefit for which the partner qualified because of the domestic partnership. The individuals need not contribute equally or jointly to the cost of these expenses as long as they agree that both are responsible for the costs.

(d). *"Declaration of Domestic Partnership."* A "Declaration of Domestic Partnership" is a form provided by the county clerk. By signing it, two people agree to be jointly responsible for basic living expenses which they incur during the domestic partnership and that this agreement can be enforced by anyone to whom those expenses are owed. They also state under penalty of perjury that they met the definition of domestic partnership when they signed the statement, that neither is married, that they are not related to each other in a way which would bar marriage in California, and that neither had a different domestic partner less than six months

before they signed. This last condition does not apply if the previous domestic partner died. The form will also require each partner to provide a mailing address.

Sec. 3. ESTABLISHING A DOMESTIC PARTNER

(a). *Methods.* Two persons may establish a Domestic Partnership by either:

1. presenting a signed Declaration of Domestic Partnership to the County Clerk, who will file it and give the partners a certificate showing that the Declaration was filed; or

2. having a Declaration of Domestic Partnership notarizing and giving a copy to the person who witnessed the signing (who may or may not be the notary).

(b). *Time Limitation.* A person can not become a member of a Domestic Partnership until at least six months after any other Domestic Partnership of which he or she was a member ended. This does not apply if the earlier domestic partnership ended because one of the members died.

(c). *Residence Limitation.* The county clerk will only file Declaration of Domestic Partnership if:

1. the partners have a residence in San Francisco; or
2. at least one of the partners works in San Francisco.

Sec. 4 ENDING DOMESTIC PARTNERSHIPS

(a). *When the Partnership Ends.* A Domestic Partnership ends when:

1. one partner sends the other a written notice that he or she has ended the partnership; or
2. one of the partners dies; or
3. one of the partners marries or the partners no longer live together.

(b). *Notice the Partnership has Ended.*

(1) To Domestic Partners. When a Domestic Partnership ends, at least one of the partners must sign a notice saying that the partnership has ended. The notice must be dated and signed under penalty of perjury. If the Declaration of Domestic Partnership was filed with the county clerk, the notice must be filed with the clerk; otherwise, the notice must be notarized. The partner who signs the notice must send a copy to the other partner.

(2) To Third Parties. When a Domestic Partnership ends, a Domestic Partner who has given a copy of the Declaration of Domestic Partnership to any third party, (or, if that partner has died, the surviving member of the domestic partnership) must give that third party a notice signed under

penalty of perjury stating that the partnership has ended. The notice must be sent within 60 days of the end of the Domestic Partnership.

(3) Failure to Give Notice. Failure to give either of the notices required by the subsection will neither prevent nor delay termination of the Domestic Partnership. Anyone who suffers any loss as a result of failure to send either of these notices may sue for actual losses.

Sec. 5

Sec. 6 LEGAL EFFECT OF DECLARATION OF DOMESTIC PARTNERSHIP

(a). *Obligations*. The obligations of the domestic partners to each other are those described by the definition.

(b). *Duration of Rights and Duties*. If a domestic partnership ends, the partners incur no further obligations to each other.

APPENDIX B: NEW YORK CITY TENANT PROTECTION REGULATIONS (1990)

[Editor's Note: Italicized portions represent language added to the subchapter and language in brackets represents deleted language. Substantially the same language was added to Subchapter B of Chapter VIII of Subtitle S of Title 9 NYCRR]

Subchapter A of Chapter VIII of Subtitle S of Title 9 NYCRR

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Section 1

Subdivision (m) of section 2500.2 is amended to read as follows:

(m) [Immediate f]Family [of Tenant] *Member*.

(1) Husband, wife, son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather [or], stepmother, *brother, sister, nephew, niece, uncle, aunt, son-in-law, or daughter-in-law of the tenant; or*

(2) *Any person residing with the tenant in the housing accommodations as a primary residence, who can prove emotional and financial commitment, and interdependence between such person and the tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered.*

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions for each other, entering into a personal relationship contract, making a do-

mestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends; members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intentions of creating a long-term, emotionally-committed relationship.

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Part 2523 of the Rent Stabilization Code is amended to read as follows:

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Section 2

Subdivision (e) of section 2523.5 is amended to read as follows:

(e) On a form prescribed or a facsimile of such form approved by the DHCR, a tenant may, at any time, advise the owner of, or an owner may request from the tenant at the time a renewal lease is offered pursuant to subdivision (a) of this section, the names of all persons other than the tenant who are residing in the housing accommodation, and the following information pertaining to such persons:

(1) if the person is a "family member" as defined in subdivision (o) of section 2520.6 of this Title and

(2) if the person is, or upon the passage of the applicable minimum period of required residency, may become a person entitled to be named as a tenant on a renewal lease pursuant to paragraph (1) of subdivision (b) of this section, and the date of the commencement of such person's primary residence with the tenant; and

[(2)] (3)

Failure of the tenant to provide such information to the owner, *regardless of whether the owner requests the information*, shall place upon all such persons not so made known to the owner, who seek to exercise the right [of renewal] *to be named as a tenant on a renewal lease as provided for in subdivision (b) of this section*, the affirmative obligation to establish such right [of renewal].